

FILED
JAN 29 2008
HEARING OFFICER OF THE
SUPREME COURT OF ARIZONA
BY: CLB

File No. 06-1200

HEARING OFFICER'S REPORT

RESPONDENT.

1 Probable cause was found in this matter on April 9, 2007, and a Complaint was thereafter filed on August 29, 2007. Service was made on Respondent by mail on September 4, 2007. Respondent's attorney filed a Notice of Appearance and a Request for Additional Time to Answer and Motion to Continue Hearing on October 18, 2007. Respondent's Motion was granted and Respondent filed an answer on October 26, 2007. Thereafter, the parties advised that they had reached a settlement of the case, and a hearing on the Tender of Admissions and Joint Memorandum was held on December 13, 2007.

CASE SUMMARY

Charges were originally brought against Respondent over his conduct in representing a defendant in two criminal cases, and his subsequent failure to respond to the Bar's inquiries concerning Respondent's conduct in those cases. Subsequent investigation by the Bar resulted in the Bar concluding that Respondent had not violated any

responsibilities in his representation of the defendant, and those allegations were dismissed by the Bar. Respondent is now involved in this process solely due to his failure to respond to the Bar's inquiries.

3. Recited below are the facts and claims which came to the attention of the Bar that provided the basis for starting the Bar's inquiry. They are set forth herein to provide a context for why the Bar was making its inquiry, and why Respondent's failure to respond is of concern to this process.

FINDINGS OF FACT

4. At all times relevant, Respondent was an attorney licensed to practice law in Arizona, having been first admitted to the practice in this State on October 21, 1989.
5. A formal Complaint was filed against Respondent in this matter on August 29, 2007.

COUNT ONE

6. On or about June 2, 2004, Respondent was assigned by the Maricopa County Office of Court Appointed Counsel to represent Anthony Lozano ("Mr. Lozano") as his criminal defense attorney in CR2004-015263
7. Mr. Lozano's case was heard in Maricopa County Superior Court (Court).
8. Mr. Lozano's codefendant, Juan Villa ("Mr. Villa"), was represented by Deputy Public Defender Jason Kalafat ("Mr. Kalafat").
9. Mr. Lozano's jury trial in CR2004-015263 began on February 17, 2005 and ended on March 2, 2005.

10. Sometime prior to the jury trial commencing, Mr. Lozano complained that Respondent told him Respondent had interviewed all of the witnesses to be called during the trial.
11. Respondent contends that he told Mr. Lozano that he had interviewed all but one remaining witness, and with regard to that witness, Mr. Kalafat had scheduled an interview and agreed to allow Respondent to question the witness at a scheduled interview.
12. Respondent also contends that less than two weeks before the consolidated trial dates: Mr. Villa entered into serious plea negotiations, Mr. Kalafat severed the defendants for trial, and Mr. Kalafat canceled the witness interview without giving Respondent advance notice and the opportunity to continue with the interview.
13. On February 28, 2007, during the jury trial referred to herein, the state called the witness referred to previously to testify regarding Mr. Lozano's gang affiliation.
14. Respondent objected to the witness's testimony on discovery grounds and because the State failed to disclose the scope and content of the witness's planned testimony.
15. Respondent informed the Court during his objections that he had not interviewed the witness prior to trial. The Court overruled Respondent's objections
16. The jury found Mr. Lozano guilty of Aggravated Assault and Escape on March 2, 2005. Mr. Lozano was sentenced on May 31, 2005.
17. Respondent moved to withdraw from the case following the completion of screening. Respondent's motion to withdraw was granted on June 14, 2005.
18. Mr. Lozano was appointed separate counsel to pursue his post conviction relief remedies outlined in Rule 32, Ariz.R.Crim.P.

19. Respondent's file for CR2004-015263 contained a photograph of Mr. Lozano holding one of his nieces.
20. Mr. Lozano complained that Respondent had not introduced the photograph at trial and had not returned the photograph to him after the case concluded
21. Respondent contends that he made a tactical decision not to use the photograph at trial because it would have bolstered the State's gang allegation theory because of the particular clothing that Mr. Lozano was wearing in the photograph.
22. Respondent further contends that the photograph remains a part of his case file, which has now been delivered by Respondent to Mr. Lozano's post conviction relief counsel.
23. Respondent was subsequently appointed by the Court to represent Mr. Lozano as his criminal defense attorney in a second criminal matter. This criminal matter involved charges against Mr. Lozano of two counts of Second Degree Murder.
24. This second case was subsequently dismissed and re-filed to add an allegation of gang affiliation and renumbered CR2005-014596.
25. On or about November 14, 2005, Respondent was appointed by the Court to represent Mr. Lozano in the newly numbered CR2005-014596.
26. Mr. Lozano's family retained Antonio Bustamante ("Mr. Bustamante") as Knapp counsel in CR2005-014596.
27. Mr. Lozano complained that Respondent had failed to challenge his Grand Jury Indictment ("Indictment") in CR2005-014596.
28. On November 14, 2005. Respondent made an oral motion to the Court to extend the time to challenge the Indictment.

29. The Court granted Respondent's motion and set a deadline to make such a challenge on December 14, 2005.
30. Respondent contends that when the State included the gang allegation, he originally thought that the best tactic would be to challenge the gang allegation by challenging the Indictment, and so moved for additional time.
31. On December 19, 2005, Respondent orally requested an extension of time to challenge the Indictment.
32. Respondent contends that he made his motion, referred to above, based upon when the Grand Jury transcripts would be available for review and that his intention and strategy remained to challenge the Indictment regarding the gang allegation.
33. The Court granted the Respondent's request, extending the deadline to January 27, 2006.
34. On March 3, 2006, Respondent orally requested another extension of time to challenge the Indictment. The Court granted Respondent's request, extending the deadline to March 17, 2006.
35. Respondent contends that between March 3, 2006, and March 17, 2006, he consulted with other criminal defense attorneys, including Mr. Bustamante, regarding the best tactic and strategy regarding the gang allegation and, based upon those conversations, Respondent began to feel that his better strategy would be not to challenge the Indictment, but to proceed to challenge the gang allegation at trial and through motion practice. Respondent did not file a challenge to the Indictment by March 17, 2007.
36. On July 20, 2006, Mr. Lozano filed a complaint against Respondent with the State Bar of Arizona ("State Bar").

37. By letter dated August 24, 2006, the State Bar requested a written response from Respondent to all of Mr. Lozano's allegations. The State Bar's letter was sent to Respondent's address as maintained by the membership records. Respondent failed to respond to the State Bar's letter.
38. By letter dated September 19, 2006, the State Bar again requested a written response from Respondent to Mr. Lozano's allegations. The State Bar's letter was sent to Respondent's address as maintained by membership records.
39. The State Bar's September 19, 2006, letter advised Respondent that failure to cooperate with a disciplinary investigation is grounds, by itself, for discipline. Respondent failed to respond to the State Bar's letter.

CONCLUSIONS OF LAW

40. The Hearing Officer finds that Respondent's conduct in not responding to the inquiries of the State Bar to be a violation of Rule 42 Ariz.R.Sup.Ct., ER 8.1(b) and Rule 53(d) & (f). The State Bar moved to dismiss the allegations that Respondent violated ER's 1.2, 1.3, 1.4, and 1.16(d).

ABA STANDARDS

41. *ABA Standard 3.0* provides that four criteria should be considered: (1) The duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; (4) the existence of aggravating or mitigating factors.

The Duty Violated

42. The parties submit that after an investigation of Respondent's conduct in representing Mr Lozano, there was no duty to Mr Lozano that Respondent violated. Respondent's misconduct in this matter was his failure in his duty to the legal system, and his profession, to respond to the State Bar's investigation into Mr. Lozano's initial Bar inquiry. Respondent's conduct, in violation of Rule 42 Ariz.R.Sup.Ct., ER 8.1(b), and Rule 53(d) and Rule 53(f), Ariz.R.Sup.Ct., implicates *Standard 7.0*. *Standard 7.3* provides "reprimand (Censure in Arizona) is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to the public or the legal system." Thus the presumptive sanction in this matter appears to be censure.

Lawyer's Mental State

43. Mr. Beren's mental state was negligent.

Actual or Potential Injury

44. While Respondent submits that there were personal reasons for his failure to respond (set forth in the Mitigating Factors), the Hearing Officer finds that there was injury to the legal system caused by Respondent's failure to respond. Not only did Respondent fail to comply with the Rules, that failure forced the disciplinary process to proceed further than was necessary given the reasonable explanations that were ultimately given to the complaints of Mr. Lozano. Given that the presumptive sanction in this matter is censure, the Hearing Officer must look at the aggravating and mitigating factors

Aggravating Factors

- 45 *Standard* 9.22(a), Prior Disciplinary Offenses. Respondent received an Informal Reprimand in file 05-0223 for failing to respond to a lawful demand for information by a disciplinary authority. Respondent was found to be in violation of Rule 42, Ariz.R.Sup.Ct , specifically ER 8.1(b).
- 46 In that the Informal Reprimand previously imposed on Respondent included misconduct similar to the misconduct found in the instant matter, *Standard* 8.3(b) is implicated. *Standard* 8.3(b) provides that reprimand (censure in Arizona) is appropriate when a lawyer has received an admonition (Informal Reprimand in Arizona) for the same or similar misconduct, then engages in further acts of misconduct.
47. *Standard* 9.22(i), Substantial Experience in the Practice of Law. Respondent was admitted to the practice of law in Arizona in 1989.

Mitigating Factors

48. *Standard* 9.32(b), Absence of a Dishonest or Selfish Motive. Respondent admits that he failed to cooperate with the Bar, but his failure to cooperate was not as a result of a dishonest or selfish motive. Respondent testified that he was involved in a three-month death penalty case at the time that the State Bar's investigation began and that, coupled with his personal issues, caused him to put off responding to the State Bar.
- 49 *Standard* 9.32(c), Personal or Emotional Problems. Attached as Exhibit B to the Joint Memorandum is a letter from Respondent's treating doctor, which more fully explains the extent of Respondent's personal problems. Further, Respondent's testimony at the hearing on the agreement indicates that for many years Respondent has had difficulties

prioritizing and organizing his life. Respondent is now in counseling and, with the assistance of his physician, working diligently at controlling his disorganized behavior

50. *Standard 9.32(d), Efforts to Rectify the Consequences of Misconduct.* Respondent testified that he recognizes that he is not best suited to practice law as a sole practitioner. He has closed his private practice and taken a job in the public sector, where his career as a criminal defense lawyer can be continued without the other duties attendant to a sole practice. Respondent has taken the steps necessary to address his personal issues, such that his failure to respond to the State Bar should not be repeated.
51. *Standard 9.32(l), Remorse.* Respondent expressed sincere remorse at the hearing on the Agreement. Respondent knows why he is in the disciplinary process, accepts full responsibility for his conduct and recognizes that his behavior disrespected the process and the Bar. This Hearing Officer was impressed with Respondent's sincerity, and his insight.

Recommended Sanction

52. The parties submit that after weighing the aggravating and mitigating factors, a censure is appropriate in this matter.

PROPORTIONALITY REVIEW

53. The Supreme Court has held that in order to achieve the purpose of discipline there must be proportionality when imposing discipline, and the discipline in each situation must be tailored to the individual facts of the case. *In re Wines*, 135 Ariz. 203, 660 P.2d. 454 (1983).

54. In *In re Bayless* SB03-0098-D (2003). The Hearing Officer and Commission found no ethical violations arising out of any dealings Mr. Bayless had with a client. However, Mr. Bayless failed to cooperate in the investigation of the case, failed to file a timely response to a Formal Complaint, failed to respond to requests for information, and failed to respond to reasonable demands of Bar Counsel despite an Order from the Hearing Officer. Three aggravating factors were considered, including disciplinary history and Mr. Bayless' experience in the practice of law. The Hearing Officer and Commission considered a sole mitigating factor absence of a dishonest or selfish motive. Mr. Bayless received a Censure.
55. In the instant case, similar aggravating and mitigating factors exist for Respondent. Also, the sole violation is a failure to respond to the State Bar.
56. In *In re Fuller*, SB-97-0065-D (1997). Mr. Fuller was censured and ordered to pay costs for not responding to the State Bar. "This case is unique in that the Hearing Committee found that none of the underlying misconduct that led to the filing of the Formal Complaint was proven by clear and convincing evidence." *Id* at pg. 1, Disciplinary Commission Report. The recommendation for Censure was based solely on the ethical misconduct of not responding to the State Bar. The Commission referred to *Standards* 7.3 and 7.4. In addition, Mr. Fuller had a disciplinary history including six Informal Reprimands for identical misconduct. The Commission found that it was Mr. Fuller's disciplinary history that "renders a sanction of Informal Reprimand totally inadequate." *Id* at pg.4.

57. In the instant case, all allegations of misconduct are being dismissed, aside from the non-response by Respondent to the State Bar's inquiry. The same appropriate *Standards* have been cited as guidance for the appropriate sanction. Respondent has a discipline history for identical conduct.
58. The parties submit, and the Hearing Officer concurs, that a censure is appropriate in this matter.

RECOMMENDATION

59. The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonte*, 176 Ariz. 182, 859 P.2d 1315 (1993). It is also the objective of lawyer discipline to protect the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the Bar's integrity. *Matter of Horwitz*, 180 Ariz. 20, 881 P.2d. 352 (1994).
60. In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's Standards for Imposing Lawyer Sanctions and the proportionality of discipline imposed in analogous cases. *Matter of Bowen* 178 Ariz. 283, 872 P.2d. 1235 (1994).
61. Having weighed all of these considerations, the Hearing Officer submits that the agreed-upon sanction is appropriate in this matter:
1. Respondent shall receive a Censure.
 2. Respondent shall pay all costs and expenses incurred in these disciplinary proceedings

DATED this 29th day of January, 2008.

H. Jeffrey Coker /cs
H. Jeffrey Coker, Hearing Officer

Original filed with the Disciplinary Clerk
this 29th day of January, 2008.

Copy of the foregoing mailed
this 29th day of January, 2008, to:

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